National Indian Gaming Commission

IN THE MATTER OF	)	
	)	**CFA-05-12**
Seneca Nation of Indians	)	
	)	**October 7, 2005**
	)	
	)	

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from Civil Fine Assessment ("CFA") issued to the Seneca Nation of Indians ("Respondent" or "Tribe"). This appeal is brought pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et. seq.*, and NIGC regulations, 25 C.F.R. Part 501, *et. seq.*

FINAL DECISION AND ORDER

After careful review of the agency record and the Respondent's submissions, the Commission finds and orders that:

1. 25 U.S.C. § 2710(b)(2)(C) requires that tribes submit annual audits of each gaming facility.
2. The Tribe owns the Seneca Niagara Casino and Seneca Allegany Casino.
3. The Tribe operated both facilities during all or part of 2003 and 2004.
4. The Tribes audit reports were due by January 27, 2005, but were not received at the Commission's offices until May 20, 2005.
5. The Chairman properly applied the factors contained in 25 C.F.R. §§ 575.3, 575.4, in determining the amount of the civil fine.

6. Civil Fine Assessment CFA-05-12 in the full amount of $20,000.00 is upheld.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

Respondent is a federally recognized Indian Tribe with tribal headquarters in Salamanca, New York. Respondent operated its class III gaming facilities, Seneca Niagara Casino and Seneca Allegany Casino, during all or part of 2003 and 2004.

IGRA requires that a gaming tribe submit an annual audit for each gaming facility it operates. 25 U.S.C. 2710(b)(2)(C). NIGC regulations require that a tribe cause to be conducted an annual independent audit of the financial statements of each of its gaming operations and submit a copy of the audit report(s), and any management letter(s) setting forth the results of the annual audit(s), to the NIGC within 120 days after the end of each fiscal year. 25 C.F.R. §§ 571.12, 571.13. The fiscal year for both Seneca casinos ended September 30, 2004.

Therefore, the audit reports had to be received by the NIGC no later than January 28, 2005.[1] Respondent's fiscal year 2004 audit reports for Seneca Niagara Casino and Seneca Allegany Casino were submitted to the NIGC in a combined audit report on May 20, 2005. Separate audit reports for Seneca Niagara Casino and Seneca Allegany Casino were received on June 14, 2005. Therefore, on June 16, 2005, the Chairman of the NIGC issued NOV-05-12 to the Respondent for failure to submit a timely annual independent audit report.

[1] We note that NOV-05-12 incorrectly stated that the audit reports were due by January 1, 2005. Audit reports were in fact due to the NIGC within 120 days of the end of the fiscal year. Therefore, the audit reports were due to the NIGC before January 28, 2005. Regardless, the audit reports were not received by the NIGC within the time allowed. The Respondent has not challenge the NOV so it is not necessary for us to discuss the effect of this mistake.

The NIGC regulations provide that, within 15 days after service of a notice of violation, or such longer period as the Chairman may grant for good cause, the respondent may submit written information about the violation. 25 C.F.R. § 575.5.

The Chairman shall consider any information so submitted in determining the facts surrounding the violation and the amount of the civil fine.

The Tribe requested and the Chairman granted extra time for the submission of written information about the violation which was received by the NIGC on July 15, 2005.

On August 9, 2005, the Chairman issued proposed civil fine assessment CFA-05-12 requiring the Respondent to pay a fine of $20,000.00.

On September 9, 2005, the Respondent filed a timely notice of appeal from the proposed assessment. The Respondent elected to waive its right to an oral hearing and instead chose to have the issue decided by the full Commission on the basis of written submissions. On September 19, 2005, the Commission received Supplemental Statement for Appeal CFA-05-12 from the Respondent. The Respondent argues that the Chairman failed to properly apply the factors in the CFA and failed to explain how the facts and circumstances are weighed or considered when applying the factors. For those reasons and for policy reasons the Respondent requests that the fine be eliminated or substantially reduced.

BURDEN OF PROOF AND STANDARD OF REVIEW

In administrative appeals of enforcement actions undertaken pursuant to 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is preponderance of the evidence. *In the Matter of JPW Consultants*, NIGC 97-4; NIGC

98-8; (Nov. 13, 1998) (citing *In the Matter of Shingle Springs Band of Mewok Indians*, NIGC 97-1, Dec. 3, 1998).

Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.* at 4. Since the violation alleged in the NOV as the basis for the CFA is conceded and not contested by the parties, we find the violation to be true for purposes of deciding the issues raised on appeal.

DISCUSSION

Pursuant to 25 U.S.C. § 2713 (a) and 25 C.F.R. § 575.4, the Chairman of the NIGC may assess a civil fine, not to exceed $25,000 per violation, against a tribe, management contractor, or individual operating Indian gaming for each violation cited in a notice of violation issued under 25 C.F.R. § 573.3. If noncompliance continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation. 25 C.F.R. § 575.4 (a)(2).

While the Chairman may exercise discretion in assessing a civil fine, 25 C.F.R. §575.4(a)-(e) identifies five factors the Chairman is to consider prior to assessing any civil fine: (1) the economic benefit of noncompliance; (2) the seriousness of the violation; (3) any history of violations by the tribe; (4) the degree of fault of the tribe, that is, any negligence or willfulness; and (5) the good faith of the tribe to correct or attempt to correct the violation. Since these factors come within the ambit of the Congressional instructions in IGRA these regulations are not "arbitrary" or "capricious". *Bluestone Energy Design v. Federal Energy Regulatory Commission*, 74 F.3d 1288 (D.C. Cir 1996).

The Respondent did not challenge the underlying notice of violation, and has readily admitted that its audit reports were submitted late. However, the Respondent argues that the CFA does not reflect all of the information and arguments the Nation has made nor does it reveal how the Chairman weighed and balanced the factors or what other factors the Chairman used on making the assessment.

Neither IGRA nor NIGC regulations require the Chairman to discuss in the CFA all information provided by the Respondent. The CFA simply reflects the information the Chairman felt most important in the assessing of a civil fine.

Neither IGRA nor NIGC regulations require the Chairman to assign a weight to any of the factors or facts involved in assessing a civil fine. It is important to note that four of the five factors contain the word "may," signifying that it is within the Chairman's discretion what weight, if any, to give that factor. We would like to discuss each of the factors in turn.

Economic Benefit of Noncompliance

The Chairman found and the Tribe agrees that no economic benefit was received from the late submission of the audit report. However, the Tribe argues that the Chairman did not state how this factor was balanced or if this factored weighed against the issuance and size of the fine. Again, neither IGRA nor NIGC regulations require that the Chairman specify what weight to give each factor. In this case, it is clear that the Chairman considered this factor to mitigate in favor of a lower fine, as do we. The Chairman had the authority to assess a fine of $25,000.00 per day. He chose not to assess the maximum. Instead, the Chairman assessed a fine less than that allowed under IGRA and NIGC regulations.

Seriousness of the Violation

The Commission considers the submission of an annual independent audit report by an independent accountant critical to the NIGC's mission to protect the integrity of Indian gaming. An accountant's ability to conduct an audit in accordance with generally accepted auditing principles and render an opinion on audited financial statements provides assurances about the security of tribal gaming revenues. The audit report prepared and submitted on a timely basis is evidence of, among other things, the integrity of the gaming operation, the adequacy of its regulation and, more specifically, of the adequacy of the books and records, the functioning of the internal financial controls, and the disclosure of information having a bearing on the financial statements.

As an explanation, the NIGC uses the audit reports to perform a risk analysis in order to measure the likelihood that the gaming operation has failed to maintain its accounting records and conduct its activities in a manner consistent with generally accepted accounting principles, or has failed to authorize, recognize, and record its gaming and gaming related transactions and activities in a manner consistent with the NIGC Minimum Internal Control Standards set forth in 25 C.F.R.§ 542. During the risk analysis, the audited financial statements are evaluated to detect information reflecting, among other things: if transactions are properly authorized, if accounting records are properly designed, if adequate safeguards exist over assets and records, if controls exist over activities conducted, if controls exist over information systems, if controls exist over access to sensitive or confidential information, and if investigation of discrepancies between control and subsidiary records are conducted. The analysis is intended to detect information that would indicate directly or indirectly that a gaming operation may be

noncompliant with the aforementioned NIGC regulations, which the agency has determined to be necessary to ensure the interests of the tribal stakeholder and gaming public are adequately protected.

The audited financial statements are only useful if they are timely. The 120-day period after the end of the fiscal year is the time afforded the independent certified public accountant to perform such testing of the financial data necessary to express an opinion on the fairness of the financial statements. Any delay in receipt of the financial statements significantly reduces the reliability and relevancy of the data to the NIGC.

The Chairman clearly articulated the above stated policy on submission of audits in a timely manner. The Commission recognizes that the Respondent was, in performing an investigation and audit, taking steps to ensure the integrity of the gaming operation. However, this fact does not lessen the seriousness of this violation. Again, the Chairman is not required to detail his thought process or engage in a sort of regulatory calculus in assessing a fine. The Chairman is simply to consider various factors in ultimately assessing an appropriate fine. The factors are simply guidelines for the Chairman.

History of Violations

THE CFA cited two prior notices of violations that had been issued to the Respondent. One violation was for the untimely submission of quarterly statement and fee payments, and the other was for the failure to license two tribally-owned gaming operations and for offering pull-tabs at a location that did not offer bingo. The Respondent argues that prior violations should not be weighed against the Tribe because they were not received under the current Tribal leadership nor were they for the same violation. Elections and changes in tribal leadership are routine in Indian Country. It is

not the intent of IGRA nor is it the policy of this Commission to wipe the slate clean every time the leadership of a tribe changes. If such a policy were to exist it would make regulatory enforcement unworkable. Additionally, if the Commission were only to consider similar violations in assessing a fine it would allow a gaming operation to violate every provision of IGRA without having any effect on the fine assessment. The Chairman and looks to prior violations as some indication of the gaming operations overall willingness to comply with IGRA and NIGC regulations.

Negligence or Willfulness

The Chairman found that this was a willful violation because the Tribe was aware that the failure to meet submission deadlines could result in enforcement action but still did not meet the deadline. The Respondent has argued that it was its auditor, not the Tribe that was responsible for the late audit. IGRA makes clear that it is the responsibility of the Tribe to ensure that audits are submitted in a timely fashion. The auditor serves as an agent of the Tribe and its actions do not relieve the Tribe of its responsibility. Based on the fact that the Tribe knew its submission would be late, it is clear that the Chairman had enough evidence to conclude that the violation was willful. Ultimately, the conduct of the gaming activity and the compliance with IGRA and NIGC regulations falls to the Respondent.

Good Faith

It is clear to us that the good faith factor is not applicable in this situation. This factor only applies when a Respondent moves quickly to achieve compliance after receiving a Notice of Violation. IGRA and NIGC regulations make clear that a written NOV is different then simply notice to the Tribe. Regardless, the Tribe did not move

quickly to cure the violation. By its own admission it knew as early as January 17, 2005, that it would not be able to submit the audit by the January 28th deadline. Respondent's Supp. Statement at 3. Simply informing the Commission that it would be in violation is not enough to demonstrate good faith.

CONCLUSION

We find that assessment of a $20,000.00 fine was appropriate in this instance and, therefore, CFA-05-12 is upheld. It is so ordered by the National Indian Gaming Commission on this 7th day of October, 2005.

PHILIP N. HOGEN
CHAIRMAN

NELSON W. WESTRIN
VICE-CHAIRMAN

CLOYCE V. CHONEY
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2005, I served a copy of the foregoing **COMMISSION DECISION** by facsimile and by certified mail, return receipt requested, upon the following:

Barry E. Snyder (and Agent for Service of Process)
Seneca Nation of Indians
G.R. Plummer Building
P.O. Box 231
Salmanca, NY 14779
Fax: 716-945-1565

Christopher Karnes, Esq.
Seneca Nation of Indians
G.R. Plummer Building
P.O. Box 231
Salmanca, NY 14779
Fax: 716-945-6869

I hereby certify that on the 7th day of October, 2005, I served a copy of the foregoing **Commission Decision** by hand delivery upon the following:

Andrea Lord, Esq.
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, D.C. 20005

Dated: 10/7/05

John Hay, Staff Attorney